

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

UNITED STATES OF AMERICA	)	<u>UNDER SEAL</u>
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI	)	

**RESPONSE TO RENEWED EXPEDITED MOTION**  
**OF THE UNITED STATES FOR CLARIFICATION REGARDING THE**  
**APPLICABILITY OF LOCAL CRIMINAL RULE 57 TO INFORMATION**  
**TO BE MADE PUBLIC IN CONGRESSIONAL PROCEEDINGS**

The government's motion and the response of counsel to the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence (hereafter "Congressional Committees") reflect the conflicting goals of full and open public congressional hearings on a matter of high public interest and the selection of a fair and impartial jury in this case. The debate between the two branches of our government is over whether testimony of Department of Justice ("DOJ") officials should be in open or closed session.

The DOJ wants the testimony in closed session because it believes testimony regarding matters the Congressional Committees have declared an intent to inquire into would violate Local Rule 57. Standby counsel contend that whether the hearings are open or closed, matters before the Congress, by leak or otherwise, usually find their way into the press. Further, DOJ has already let the horse out of the barn by releasing to Congress without restriction documents we had no idea it would release. Locking the door at this juncture may be of little utility. Given what we now see the hearings will focus on and the information already released, we respectfully request that the Court postpone jury selection until after the first of next year, whether the DOJ officials testify in open or closed session, thus allowing time for the effect of any prejudicial publicity generated by

congressional hearings to dissipate before jury selection in this case begins. We further request that the defense be given copies of all testimony before the Congressional Committees and all documents relied on during the hearings as part of discovery in this case.

### **BACKGROUND**

The government has moved for an order “clarifying” the applicability of Local Rule 57 to testimony by DOJ officials in public hearings scheduled before the United States Congress. It seems the Congress intends to proceed with open hearings on topics DOJ officials think should be closed in order for them to both fully testify and avoid conflict with Local Rule 57. They believe the issue is in better focus now than when the Court first considered it on August 29.

The government’s motion thus directs focus upon the tension between two noble considerations. The first is the public’s right to full and complete information through open congressional inquiry as to how the government’s intelligence and law enforcement agencies functioned prior to the national tragedy on 9/11. The second is Mr. Moussaoui’s right to a fair and impartial jury which Local Rule 57 is designed to safeguard. The sincerity of DOJ’s position would be more convincing if it had sought this Court’s guidance before releasing to the Congress the documents attached to the government’s pleading.

Standby counsel also face a conflict. Jury selection begins on November 18 when the jurors fill out their questionnaires. We are of course concerned that congressional hearings, open or closed, on the eve of picking the jury will create a substantial possibility of adversely affecting the selection process. On the other hand, there is no doubt that open hearings will provide information of significant value to the defense that it might not be able to obtain if hearings are closed without assistance from the Court.

The Attachments to the Government's Motion  
Give the Defense Great Cause for Concern

It is absolutely clear where the Congressional Committees are headed. They appear to be directed toward an inquiry which, as a predicate, assumes Mr. Moussaoui's guilty knowledge of 9/11 -- and then will probe as to why the FBI did not solve the Moussaoui riddle earlier than it did. In this regard, the attachments to the government's motion give us great cause for concern. First, five (5) of the documents are currently, at least insofar as the latest information given to the defense is concerned, still classified.<sup>1</sup> They are designated in our CIPA submission as documents we need for defense preparation but because no one has advised of declassification, we have not and cannot remove them from the SCIF or show or discuss them with Mr. Moussaoui. Yet the government has already given them to Congress as declassified documents. If they have in fact been declassified, we should have been advised. The failure to provide advice as to declassification in a timely fashion, if indeed that is the case, throws unnecessary roadblocks into the way of the *pro se* defendant who is trying to prepare his case for trial.

Moreover, these documents portend great prejudice to Mr. Moussaoui if we correctly perceive how the Congressional Committees intend to use them. On August 29, the date of the prior hearing on this issue, we thought the documents attached to the government's most recent pleading were classified and that the hearing that day had nothing to do with release of classified information to the Congress. Further, at that time, Mr. Moussaoui had not even seen the information which will apparently be the subject of the congressional hearings because it was classified, and therefore, he could not have consented in any knowing or intelligent manner to its release to the Congress. The

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<sup>1</sup> FBI 01898-01923, 01986, 02131-02141, and 11184-11185.

government concedes Mr. Moussaoui did not waive his right to seek whatever relief might be appropriate from prejudicial publicity which might be generated by these hearings.

Finally, even if the documents attached to the government's motion have now been declassified, their previous release to the Congress violated the existing protective order and Local Rule 57. The defense expects prejudice to flow from the use of these documents, whether DOJ officials testify in open or closed session.

The Congressional Hearings Have Already Provided Information  
Useful to the Defense on the Death Penalty Issue

The hearings at issue have already produced FBI information which would be valuable to the defense in the penalty phase of this case if there were to be one. This information has not been produced heretofore as *Brady*, compelling the defense to seek transcripts from, and exhibits used, in these hearings.

The government seeks to impose the death penalty because it says Mr. Moussaoui's conduct "caused" death. Specific conduct referred to is Mr. Moussaoui's responses during an FBI interrogation following his arrest in August 2001. The government alleges, in effect, that had Mr. Moussaoui been more forthcoming during this interview, the deaths on 9/11 would not have occurred, *i.e.*, Mr. Moussaoui's conduct during the interview caused death. To prove this, the government will have to show, *inter alia*, that Mr. Moussaoui had more knowledge than the government already had concerning 9/11, that the government would have acted on it, and that if it had, the deaths on 9/11 could have been averted.

On the issues of whether the government's pre-9/11 knowledge was greater than Mr. Moussaoui's and whether the government would have acted on whatever the jury might determine

Mr. Moussaoui's knowledge was, the Congressional Committee hearings have already proven informative. An FBI agent has testified that he was urging FBI Headquarters to pursue one of the hijackers in August 2001. The agent was aware that al-Mihdhar, one of the 19 hijackers, was a terrorist and that he was in the United States. The agent argued that the Bureau's failure to pursue al-Mihdhar could result in someone getting killed. See "FBI Agent Urged Search For Hijacker," by Dan Eggen and Dana Priest, *The Washington Post*, Sept. 21, 2002 (Attachment A). Notwithstanding the agent's urgings, Bureau Headquarters did not follow his advice. A jury, confronted with the information from this agent and aware of FBI Headquarters' lack of interest in pursuing the contents of Mr. Moussaoui's laptop, could conclude that determining whether FBI Headquarters would have followed up on any information from Mr. Moussaoui, had he provided any, requires a high degree of speculation where proof beyond reasonable doubt is required. The problem here, of course, is that the information concerning the agent referred to in the attached Washington Post article was not provided to the defense as *Brady*. We learn of it only from the congressional hearings. There are other examples of *Brady* information publicized by the Congressional Committees which have not been shared with the defense. The defense should not be required to rely on newspaper reports to learn this information. This is why the defense requests hearing transcripts and exhibits, whether open or closed.

The Congressional Hearings Hold the Promise of Providing Answers  
to Questions the Defense Would Otherwise be Unable to Obtain in Advance of Trial

Standby counsel also anticipate that additional information relevant to the defense will be revealed, or will perhaps even be created, by the congressional hearings on the issue of whether anything Mr. Moussaoui did following his August arrest was the proximate cause of anyone's death.

For example, at page 8-9 of the government's motion, it sets forth the congressional committee's plan to inquire into, *inter alia*, Mr. Moussaoui's invocation of his constitutional right to counsel when asked if he intended to use an airplane in a terrorist act. Rather than provide counsel and continue the interrogation – the FBI ceased its inquiry at that point, never to ask Mr. Moussaoui another question until after 9/11.

We are anxious to learn the details of the FBI's thinking as to why it did not make arrangements for Mr. Moussaoui to have counsel at that point. Congressional inquiry may help answer this question. With the advice and assistance of an attorney, pre-9/11, when there had been no loss of life, perhaps an offer of immunity could have been negotiated and whatever information of interest Mr. Moussaoui might have had could have been obtained at that point. Can anyone say with certainty what would have happened if the government had simply provided an attorney and continued its interrogation? Can Mr. Moussaoui's invocation of his constitutional rights by asking for counsel when the interrogation became accusatory, be viewed as conduct causing death?

We are hopeful that the congressional committee will inquire into why, if Mr. Moussaoui was viewed as such a significant source of intelligence information, the FBI preferred not to question him at all rather than obtain an attorney and then work with the attorney to find a way to continue the interrogation. We are hopeful that the congressional committee will expose as false the belief held by many law enforcement and intelligence agencies that introduction of an attorney into an interrogation situation means that no more information will be obtained, and that the subject will "clam up." The congressional committee will instead hopefully establish that counsel often facilitate an interrogation by easing the subject's fears through counseling, advice, and by negotiating legal protections, and that the FBI's termination of the interrogation when Mr. Moussaoui invoked his

constitutional right to counsel was a significant act of negligence on its part if it believed it had serious reason to be questioning Mr. Moussaoui in the first place.

The Congressional Hearings, Whether Open or Closed, Are a Threat  
to the Ability to Select a Fair and Impartial Jury on the Current Schedule

If jury selection is to proceed as scheduled, the hearings are simply too close in time to that process for standby counsel to agree with any relaxation of Local Rule 57.<sup>2</sup> Standby counsel would be far less concerned, however, if there were more time between the hearings and jury selection. The additional time would allow any effects of the prejudicial publicity generated by the hearings to dissipate. It would also permit the jury questionnaires to be “tweaked” to address any specific problematical publicity flowing from the hearings including, most importantly, whether any prospective juror followed the hearings.

**CONCLUSION**

For the foregoing reasons, standby counsel submit that because of the documents already provided to Congress apparently without restriction upon their use, and the likelihood that DOJ officials’ testimony will become public by leak even if given in closed session, that there be a delay in the commencement of jury selection until next year. This approach protects the public’s interest in full and open congressional hearings on a matter of significant public interest and the selection of a fair and impartial jury in this case. We also respectfully request that the Court order the government to provide discovery to the defense of the testimony at the hearings, whether in open or closed session, and related exhibits, whether published in open or closed session.

Respectfully submitted,

STANDBY COUNSEL

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<sup>2</sup> Even if the hearings are closed for the testimony of DOJ officials, the likelihood of leaks is high.

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### **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Response to Renewed Expedited Motion of the United States for Clarification Regarding the Applicability of Local Criminal Rule 57 to Information To Be Made Public in Congressional Proceedings was served upon AUSA Robert A. Spencer, AUSA, David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, via facsimile and by placing a copy BY HAND in the box designated for the United States Attorney's Office in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia and via first class mail to Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, VA 22314 this 23rd day of September 2002.

I further certify that on the same day a true copy of the same pleading was sent by facsimile and regular mail to: Michael Davidson, General Counsel, Joint Inquiry Staff, Senate Select Committee on Intelligence, House Permanent Select Committee on Intelligence, Ford House Office Building, Rm. H2-167, Washington, D.C.

/S/

Frank W. Dunham, Jr.

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## FBI Agent Urged Search for Hijacker

Request Was Turned Down Before Attacks, Panel Is Told

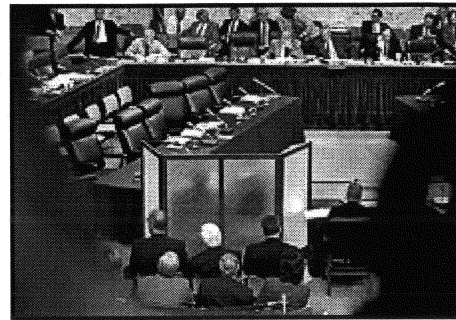
By Dan Eggen and Dana Priest  
Washington Post Staff Writers  
Saturday, September 21, 2002; Page A01

Two weeks before the Sept. 11 terrorism attacks, a desperate FBI agent begged his superiors to launch an aggressive hunt for one of the men who would participate in the suicide hijackings, warning that "someday someone will die" because his request was denied, according to testimony before a congressional panel yesterday.

The New York special agent, testifying behind a screen to protect his identity, choked back tears as he described how he asked his Washington superiors on Aug. 29, 2001, to allow his office to join the search for Khalid Almihdhar, who would later help commandeer the aircraft that slammed into the Pentagon.

But lawyers in the FBI's National Security Law Unit refused. They said information obtained through intelligence channels -- that Almihdhar was an al Qaeda associate who had recently reentered the United States -- could not legally be used to launch a criminal investigation.

"Someday someone will die -- and [legal] wall or not -- the public will not understand why we were not more effective and throwing every resource we had at



A screen protects the identities of a CIA officer and a New York City FBI agent who testified at a joint Intelligence Committee hearing on Capitol Hill Friday. (Ray Lustig - The Washington Post)

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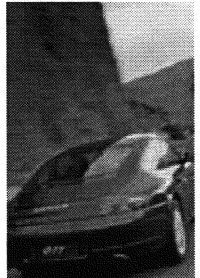
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responded in a blistering e-mail to headquarters. "Let's hope the National Security Law Unit will stand behind their decisions then, especially since the biggest threat to us now, UBL [Osama bin Laden], is getting the most 'protection.' "

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The agent's testimony, delivered to a stunned, silent audience at a hearing of the House and Senate joint intelligence panel, was the latest in a litany of missed clues uncovered by congressional investigators probing intelligence agencies' performance before Sept. 11. The account was reminiscent of the words of another FBI agent, Coleen Rowley, who testified last spring that headquarters officials limited attempts by the Minneapolis field office to investigate alleged Sept. 11 conspirator Zacarias Moussaoui in the weeks before the attacks.

The New York agent's dispute with Washington was included in a report released yesterday by the congressional panel. The document also provided more detail about the CIA's repeated failures to act on intelligence about Almihdhar and his frequent companion, fellow Flight 77 hijacker Nawaf Alhazmi.

The CIA monitored Almihdhar at a meeting of al Qaeda operatives in Malaysia more than 18 months before the Sept. 11 attacks, and knew at that time that he held a visa that allowed him to enter and exit the United States repeatedly. But the report found that the CIA did not adequately inform other agencies and made no effort until summer 2001 to add the names of Almihdhar or Alhazmi to immigration watch lists, even as it compiled increasingly disturbing information about his ties to al Qaeda.

One CIA cable about Almihdhar in March 2000 was marked, "Action required: None, FYI."

"There were numerous opportunities during the tracking of these two terrorists when the CIA could have alerted the FBI and other law enforcement authorities to the probability that these individuals either were or would be soon in the United States," said Eleanor Hill, staff director for the joint inquiry. "That was not done."

In another report earlier this week, Hill's investigators found that U.S. intelligence agencies had ample evidence before Sept. 11 that al Qaeda sought to launch attacks on U.S. soil, and that terrorists had frequently considered using airplanes as weapons. Earlier this year, it was revealed that the FBI failed to seek a warrant for Moussaoui's computer or pay attention to warnings from a Phoenix agent that terrorists might be training at U.S. flight schools.

"This failure is massive," Sen. Carl Levin (D-Mich.) said. "We have failure piled upon failure."

Sally Reegenhard, whose firefighter son Christian was killed at the World

Trade Center, said yesterday that "these people are guilty of malfeasance. They should be brought up on criminal charges. They are partly responsible for the deaths of 3,000 people."

CIA Director George J. Tenet acknowledged during closed testimony in June that the agency had made mistakes in the case and should have added Almihdhar and Alhazmi to a State Department watch list prior to August 2001, according to the panel's report.

Yesterday, officials from the FBI and CIA, while disagreeing over some details of the Almihdhar affair, testified that overwhelming workloads, ongoing terrorist threats and legal restrictions affected their responses.

A CIA officer involved in the case, who also testified behind a screen, said the errors were "the kinds of misses that happen when people, even very competent dedicated people . . . are simply overwhelmed."

Michael Rolince, a special agent-in-charge at the FBI's Washington field office, told the panel that restrictions on the sharing of information between the CIA and FBI contributed to missteps in the Almihdhar case.

"In terrorism cases, this became so complex and convoluted that in some FBI field offices, FBI agents perceived walls where none actually existed," Rolince said.

The CIA first picked up Almihdhar's trail in Kuala Lumpur in January 2000, when he was identified as a participant at a meeting of suspected al Qaeda associates. U.S. intelligence agencies were on a state of high alert to terror threats because of the arrest a month earlier of Ahmed Ressam, who was caught entering the United States from Canada with explosives in a plot to bomb Los Angeles International Airport.

But congressional investigators found that the CIA repeatedly failed to alert the FBI or others to Almihdhar and his possible connections to terror.

By the time Almihdhar first came to Malaysia, the congressional report said, the CIA knew his name, passport number, birth information and U.S. visa status. They also identified another participant as Alhazmi, whose brother, Salim, was known to authorities. The CIA didn't know that the National Security Agency had already linked Alhazmi with al Qaeda.

According to a version of events first related by CIA officials earlier this year, the agency sent a cable to CIA stations worldwide on Jan. 5, 2000, highlighting Almihdhar's travel to Malaysia and noting that his passport contained a multiple-entry visa. The CIA message said the information was being passed to the FBI. It was provided verbally the next day to an FBI agent.

But investigators said they have found no documents at the CIA or FBI indicating that the information was sent in writing to the bureau. They noted that a CIA e-mail at the time said the FBI agent was told "a lot of suspicious activity has been observed but nothing that would indicate

evidence of an impending attack or criminal enterprise."

By that summer, the Malaysia meeting had faded from view at the CIA. Almihdhar and Alhazmi went about their activities unfettered that spring, using their own names on documents in San Diego, taking flight lessons and, in Almihdhar's case, flying to Frankfurt, Germany, in June. Alhazmi renewed his visa in July.

In October 2000, two al Qaeda operatives bombed the USS Cole in Yemen, killing 17. Investigators soon identified the plot's organizer as Tawfiq bin Attash, also known as Khallad. Two Cole conspirators had delivered money to Khallad in January 2000. The place: the meeting in Kuala Lumpur.

Thus, investigators noted in their report, by January 2001 the CIA knew that Almihdhar and Alhazmi had been in contact with the suspected mastermind of the Cole attack in Malaysia. Yet their names were still not added to a watch list, which would have flagged Almihdhar when he tried to return to the United States months later. CIA officials again failed to inform the FBI of the duo's entry into the country, FBI officials said.

In July, a CIA officer assigned to the FBI discovered a CIA cable chronicling Khallad's presence at the Malaysia meeting and fired off an e-mail to the CIA's counterterrorism center: "This is a major league killer, who orchestrated the Cole attack and possibly the [1998 East] Africa bombings." That message prompted another look at the Malaysia meeting, this time by an FBI analyst who discovered Almihdhar's travels and his return to the United States on July 4.

Finally, on Aug. 23, the CIA sent cables to the State Department, the FBI, the Immigration and Naturalization Service, and the Customs Service, requesting that four "bin Ladin related individuals," including Almihdhar and Alhazmi, be put on a watch list. At the same time, the FBI field office in New York, then the center of terrorism probes at the bureau, sought the criminal investigation of Almihdhar but was rebuffed.

On Sept. 11, after the World Trade Center was struck, the FBI agent and his colleagues received the passenger manifests from the four fatal flights. Yesterday he told the panel that he yelled angrily: "This is the same Almihdhar we've been talking about for three months!"

His supervisor, trying to reassure him and the others, answered back: "We did everything by the book."

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